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Paper No. 21

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DEC 23 2002

In re Application of
Papadopoulou et al.
Application No. 08/931,721
Filed: September 16, 1997
Attorney Docket No.
1038-729MIS:

OFFICE OF PETITIONS
DECISION ON PETITION

This is a decision on the Renewed Petition under 37 CFR 1.137(b), filed September 29, 2000, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

After a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Commissioner. Therefore, it is extremely important that petitioner submit a complete and proper reply as the condition for allowance requires. The Commissioner's decision will be based solely on the administrative record in existence.

The above-identified application became abandoned for failure to properly and timely reply to the Notification of Non-compliance with 37 CFR 1.192(c) (hereinafter "Notice"), mailed on July 19, 2000. The Notice set a one (1) month period for reply. No extensions of time under 37 CFR 1.136(a) were available. Accordingly, the application became abandoned on August 20, 2000.

A petition to revive the application under 37 CFR 1.137(b), along with an Amended Appeal Brief, were filed on September 29, 2000. The petition was dismissed by this Office in a Decision mailed on August 22, 2002, and corrected and re-mailed on September 17, 2002. The Decisions informed Petitioner that the Amended Appeal Brief failed to place the application in condition for allowance.

Petitioner files the instant Renewed Petition wherein Petitioner initially corrects for the Office the first named applicant in the above-identified application, the change of which is incorporated herein.

Petitioner also takes issue, in the Renewed Petition, with the Notice of Abandonment, mailed on September 10, 2002, which, Petitioner alleges, incorrectly advises that the reason for abandonment is Petitioner's failure to properly reply to the Office letter, as opposed to the Notice of Non-Compliance. The Renewed Petition further argues that Applicants have already filed a reply to the Office letter, namely, the Notice of Appeal and Appeal Brief, and thus Applicants reply "was a proper reply to the outstanding requirement".

This argument incorrectly assumes that the Notice of Appeal and Appeal Brief were a proper reply to the final rejection. The Appeal brief was defective. A defective Appeal Brief is not a complete and proper reply to the final rejection. Petitioner was so notified and given one month to correct the deficient Appeal Brief; however, Petitioner has yet to make the required correction(s), and has thus failed to file a complete and proper reply as the condition of the case requires. Petitioner is directed to the MPEP, section 711.02, which reads:

37 CFR 1.135(a) specifies that an application becomes abandoned if applicant "fails to reply" to an office action within the fixed statutory period. This failure may result either from (A) failure to reply within the statutory period, or (B) insufficiency of reply, i.e. failure to file a "complete and proper reply, as the condition of the case may require" within the statutory period (37 CFR 1.135(b)).

This section explains that abandonment occurs when petitioner fails to timely and properly reply to the outstanding Office action. In this instance, the outstanding Office action is the Office letter mailed July 19, 2000. Petitioner filed a timely reply; however, the reply was not a proper reply. Petitioner was so notified in a Notification of Non-compliance with 37 CFR 1.192(c), and given a one month period to correct the reply to wit: the Appeal Brief, and thus submit a complete and proper reply to the Office letter of July 19, 2000. Because Petitioner has failed to satisfy the Notification of Non-compliance with 37 CFR 1.192(c), Petitioner has failed to file a timely and proper

reply to the outstanding Office action. The application therefore, remains abandoned.

The Office letter mailed July 19, 2000, and the Notice of Non-Compliance mailed July 19, 2000, are not mutually exclusive documents, but the latter explains that the reply to the former is not a complete and proper reply, and provides an opportunity to correct the deficiency. Moreover, Petitioner's focus on whether the Notice of Abandonment correctly or incorrectly advises the reason for abandonment is misplaced.

Further to this, Petitioner's assertion that the Notice of Appeal and Appeal Brief, and thus Applicants reply "was a proper reply to the outstanding requirement", ignores Petitioner's own argument - that the reason the application became abandoned is for failing to comply with the Notice of Non-Compliance with 37 CFR 1.192(c). Petitioner was notified *on several occasions prior to receiving the Notice of Abandonment* that the reason for abandonment of the application was the failure to file an Appeal Brief that complies with 37 CFR 1.192(c). (Emphasis supplied). Petitioner was advised in the Notice of Non-Compliance with 37 CFR 1.192(c), mailed on July 19, 2000, that the Appeal Brief, filed on April 26, 2000, was defective. In his petition filed on September 29, 2000, Petitioner acknowledged that the application was abandoned for failure to timely respond to a Notification of Non-Compliance [albeit Petitioner incorrectly cited to 37 CFR 1.93(c), when the applicable section, as stated in the Notice, is 37 CFR 1.192(c)]. Petitioner was again advised of the reason that the application is held abandoned in the Decision on Petition mailed on August 22, 2002. The Notice of Abandonment was then mailed on September 10, 2002, well after Petitioner had been notified on at least two occasions, and well after Petitioner himself acknowledged that the application was abandoned for failure to timely respond to a Notification of Non-Compliance. Finally, in the Corrected Decision on Petition mailed September 17, 2002, it was reiterated to Petitioner that the application "became abandoned for failure to properly and timely reply to the Notification of Non-compliance with 37 CFR 1.192(c) (hereinafter "Notice"), mailed on July 19, 2000." To now argue that the Notice of Appeal and Appeal Brief was a proper reply completely ignores the Notice of Non-Compliance.

Because the Appeal Brief fails to comply with 37 CFR 1.192(c), it is not a complete and proper reply to the Office letter, mailed July 19, 2000. In this instance, Petitioner's failure is a result of the insufficiency of the reply, specifically, the

failure to file a complete and proper reply, as the condition of the case requires. The application is thus abandoned for failure to "timely file a proper reply to the Office letter mailed on July 19, 2002", as correctly stated in the Notice of Abandonment.

It is also noted that a Notice of Abandonment in no way affects the status of the application. The Manual for Patent Examining Procedure ("MPEP"), section 714.17, provides that "[t]he examiner *should* notify the applicant or attorney at once that the application has been abandoned by using Notice of Abandonment form PTOL-1432." (Emphasis supplied). The mailing of a Notice of Abandonment is not a requirement of this Office, but a courtesy to Petitioner. Further to this, section 711.04(c), provides that "in no case will mere failure to receive a notice of abandonment affect the status of an abandoned application." The Notice of Abandonment was obviously not the cause of Petitioner's failure to file a complete and proper Appeal Brief in the first instance. In this instance petitioner was timely notified that the Appeal Brief was defective, and has yet to correct the deficiencies therein, and while the Office attempts to notify an applicant in a timely manner of errors made in the filing of any replies to Office actions, the Office is not obligated to do so prior to the abandonment of the application.

Petitioner finally argues in the Renewed Petition that the Corrected Decision is incorrect when it states that "'the required reply, which may be met by the filing of a notice of appeal and appeal and requisite fee...'", because a Notice of Appeal and Appeal Brief have already been submitted. *Renewed Petition at p.2, quoting the September 17, 2002 Corrected Decision on Petition at p.1.*

Petitioner is advised that the statement uses the word "may", and describes possible responses which may constitute the required reply. Again, Petitioner is advised that this application is abandoned because the Appeal Brief is not in compliance with 37 CFR 1.192(c), and thus does not constitute the required reply to the Office letter.


Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents
 Box DAC
 Washington, D.C. 20231

By facsimile: (703) 308-6916
Attn: Office of Petitions

By hand: Office of Petitions
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Telephone inquiries concerning this matter should be directed to the undersigned at (703) 305-0014.


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